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UNDER SECRETARY OF STATE

Attention MRS MULLETT
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May 29, 1972

MEMORANDUM FOR THE PRESIDENT

SUBJECT: International Environmental Negotiations

On May 19, 1972, Dr. Kissinger requested that the Under Secretaries Committee* review pending international negotiations on the environment and submit a report for your consideration. The status of these negotiations is reviewed below, and outstanding issues related to the Ocean Dumping Convention are presented for decision.

Stockholm Conference on the Human Environment

The United Nations Conference on the Human Environment will be held at Stockholm June 5 to 16, 1972. U. S. positions covering over 90 recommendations for international action and a declaration on the human environment have been prepared by the interagency Committee on International Environmental Activities chaired by Christian A. Herter, Jr. There are no outstanding interagency disagreements on these positions.

The Under Secretaries Committee understands that the Chairman of the U. S. Delegation, Chairman Train of the Council on Environmental Quality, is reporting directly to you on plans for U. S. participation in the Stockholm Conference.

World Heritage Trust

Following your initiative of February 8, 1971, concerning establishment of a World Heritage Trust, a

*For the purposes of this report, the Under Secretaries Committee has included, in addition to regular members, the Council on Environmental Quality and the Environmental Protection Agency.

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draft convention was developed in a meeting of experts at UNESCO. At this time, the interested agencies are reviewing the draft, which will be formally circulated by UNESCO in June, with the objective of completing a convention at the UNESCO General Conference later this year. This Committee will forward a separate memorandum on this subject should unresolved interagency disagreements develop.

Ocean Dumping Convention

Also on February 8, 1971, you instructed the Secretary of State, in coordination with the Council on Environmental Quality, to develop and pursue international initiatives directed toward banning unregulated ocean dumping and strictly limiting ocean disposal of materials harmful to the environment.

Pursuant to this directive, the U. S. tabled a draft convention during June, 1971, at a preparatory meeting for the Stockholm Conference. The draft was further discussed at Ottawa in November, 1971, and Reykjavik in April, 1972. The United Kingdom has called a working level meeting at London May 30 - 31, 1972, to complete the drafting of the convention. This meeting is to be followed by a plenipotentiary meeting later this year.

Our effective participation in the London meeting requires resolution of two interagency disagreements. These involve: (1) the treatment of military vessels and aircraft, and (2) procedures for amending annexes to the convention which are concerned with specific substances and criteria.

The Department of Defense is submitting its views and recommendations separately. The views and recommendations of other interested agencies are presented below.

Objectives. In seeking an acceptable ocean dumping convention, our objective has been to provide for regulation of the ocean dumping of all industrialized states and thus avoid possible economic disadvantages to the U. S.

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from domestic dumping restrictions. Further objectives have been to achieve the first international step in controlling land-source marine pollution and to accomplish this in a forum other than the Law of the Sea Conference where developing countries might attempt to use the matter as a bargaining lever.

The achievement of these objectives must be consistent with the national security needs of preserving the freedom of mobility and secrecy of movement of U. S. military vessels and aircraft through and over the world's oceans. Consequently, it is essential that foreign states not be able to use the convention as a basis for interfering with operations of U. S. military vessels or aircraft.

Options for Treatment of Military Vessels and Aircraft. There are two basic approaches: (1) exemption of military vessels and aircraft, and (2) application of the principle of sovereign immunity.

Under the exemption approach, military vessels and aircraft would be exempt from the application of standards set by the convention. Although international standards would not apply, flag states would still be able to apply standards to their own vessels, and coastal states would continue to be able to apply standards to foreign military vessels and aircraft in their territorial seas, internal waters and ports.

The following considerations argue against pursuing this course:

-- The Reykjavik meeting in April of this year was attended by 29 interested countries. The U. S. held to the position of exemption for military vessels and aircraft but received expressions of possible support from only two other countries. Others pressed for the sovereign immunity approach (discussed below), and this approach was reflected in the report of that meeting.

-- If it should now prove possible to secure agreement on the exemption approach among industrialized countries, developing

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countries would probably reopen the matter in the broader law of the sea context. A number of developing countries are opposed to an exemption for military vessels and aircraft, and injection of the ocean dumping problem into the law of the sea context could not only open an undesirable debate on military vessels and aircraft but also stimulate exorbitant claims of jurisdiction by coastal states.

-- In the final analysis, most states are insisting in many forums that all vessels and aircraft observe appropriate pollution control standards. Our major allies in the law of the sea negotiations are the twelve parties to the Oslo Convention which is concerned with dumping in the North Sea. That Convention granted sovereign immunity (but not exemption) to military vessels and aircraft. We can reasonably expect to reach agreement on the sovereign immunity approach in the Ocean Dumping Convention.

Under the accepted international law principle of sovereign immunity as it relates to dumping by vessels and aircraft, warships and military aircraft are subject to the legislative jurisdiction of a coastal state when they are in its territorial sea, internal waters or territory, as well as the 12-mile "contiguous zone" for certain purposes. However, under this principle, the coastal state can take only one type of enforcement action -- expulsion of the vessel or aircraft from its territory. It can also submit a diplomatic protest and claims to the flag state.

The practical effect of the application of this principle in the ocean dumping context is that the standards and terms of the Ocean Dumping Convention would apply to all military vessels and aircraft. However, coastal states would have no enforcement powers over foreign military vessels and aircraft other than expulsion. On the high seas, enforcement would remain the prerogative of the flag state. In this connection,

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it should be emphasized that the Ocean Dumping Convention is consistent with pending U. S. domestic legislation and would place no greater obligations on our military vessels and aircraft than already contemplated under this legislation.

We note that in its separate remarks on this matter, the Department of Defense states: "Although military vessels and aircraft adhere to more stringent pollution standards than contained in various conventions, deviations may be required due to operational necessity." Under Article III of the Ocean Dumping Convention, it is specifically provided that "disposal of matter incident to or derived from the operation of vessels or aircraft... shall not constitute dumping." For military vessels and aircraft this would cover training operations or other normal activities. In addition, Article V provides that dumping prohibitions shall not apply where the safety of human life is threatened, for example, in accidents at sea.

As regards specific prohibited substances, the Ocean Dumping Convention, as drafted, provides that each party has the option of declaring that it does not accept proposed amendments. This can also serve to safeguard our military interests should unacceptable proposals be put forward in the future. Moreover, our delegation to the London meeting is instructed to eliminate from the draft convention any obligation of the parties to the convention to adhere to more stringent prohibitions or criteria which might be established in regional dumping conventions.

In addition to such safeguards as the foregoing, the Department of State and the Council on Environmental Quality believe that, if considered essential, the U. S. could urge the inclusion in the Ocean Dumping Convention of an emergency waiver procedure.

In summary, achievement of a global ocean dumping convention is important to our national interests. The success of the London meeting is critical to establishment of such a convention outside of the law of the sea

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negotiations where this matter would be more difficult to deal with in view of the attitudes of developing countries. The Council on Environmental Quality and the Environmental Protection Agency believe the U. S. may be required to accept the sovereign immunity approach if a meaningful convention is to be achieved, although they are prepared to initiate discussions in London on the basis of the exemption approach. The Department of State understands the preference of the military for this exemption approach and has sought such an approach in the past. These efforts did not succeed. The Department believes it would be unrealistic to pursue this approach in the two-day meeting in London and regards the sovereign immunity approach -- together with other provisions of the draft convention -- as adequate to meet our security interests.

Recommendations on "Exemption" or "Sovereign Immunity"

The Department of State recommends that the sovereign immunity approach be adopted as the U. S. position at the London meeting on the Ocean Dumping Convention.

Approve _____

Disapprove _____

The Department of State further recommends that if it is decided to seek the exemption approach, the U. S. Delegation should have discretion in using one or more of the several formulations available for that approach, and that the sovereign immunity approach be available to the U. S. Delegation as a fallback position.

Approve _____

Disapprove _____

The Council on Environmental Quality and the Environmental Protection Agency recommend that the U. S. Delegation to the London meeting take the initial position of urging acceptance of exemption of military vessels and aircraft proposing one or more of several possible formulations. They further recommend that should this not be accepted, the U. S. Delegation should be authorized to accept sovereign immunity for military vessels and aircraft.

Approve _____

Disapprove _____

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Amendment Procedures

The Ocean Dumping Convention will contain three annexes: one listing substances the dumping of which would be prohibited subject to narrow exceptions, one listing substances the dumping of which would only be permitted by specific permit, and one setting forth provisions to be considered in establishing criteria governing the issuance of specific permits and the granting of general permission for dumping of all other substances.

The Department of State, Council on Environmental Quality and the Environmental Protection Agency support the present U. S. position of an amendment procedure for revising annexes to the Ocean Dumping Convention under which an amendment would enter into force for only those parties ratifying that amendment after ratification by two-thirds of the parties to the Convention. The three agencies would also consider acceptable the same procedure changed so that amendments would enter into force for all parties except those that opted out by declaring non-acceptance within a specified time. These procedures would permit a party to choose in each case between the desirability of uniform regulation of ocean activity under international agreement and countervailing specific national interests. The Department of Defense supports amendment procedures requiring the unanimous agreement of all parties, proposed by a sufficient number of countries to lay the proposal to rest.

Procedures under which a treaty can be amended by fewer than all parties are commonplace. The particular requirements of these procedures tend to vary by category of agreement. However, in the category of regulatory agreements, the present U. S. position on the Ocean Dumping Convention is more conservative than the procedure most frequently followed in current international practice, i. e., the adoption of internationally binding requirements subject to opting out within a specified period. Examples of such treaties are the Universal Postal Union Convention of 1874, the 1944 Chicago Convention (ICAO), WHO, IMO, the IMCO Facilitation Convention, the Road Traffic Convention, the Whaling Convention, the Atlantic Tuna Convention, and the 1954 Oil Pollution Convention as amended.

The achievement of expeditious non-unanimous amendment procedures is an essential tool in multilateral

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diplomacy in an expanded international community. Without it, the U. S. simply could not easily achieve objectives we regard as desirable or essential. For example, the U. S. fought long and hard to achieve the "opting out" Protocol to the Atlantic Fisheries Convention because of urgent domestic conservation and economic needs. The old unanimous ratification procedure simply was not responsive or fast enough for us.

If unanimous amendment to annexes is required, it would be virtually impossible to take account of changes in technology and knowledge which dictate either additions or deletions which may be of economic or political benefit to the United States, since any country would be able to veto an international obligation which might otherwise subsist between other important countries with which the United States competes. In effect, even the smallest country would have a veto power. On the other hand, under the two-thirds approach, the United States would have greater ability than most countries to tailor results to its own needs or to marshal a "blocking third."

There is, moreover, no reason whatever to think a unanimous amendment procedure would be acceptable to other countries. This procedure was proposed at Reykjavik by Denmark, whose representative seemed totally unaware of precedents to the contrary. The proposal was supported by no one and opposed by a sufficient number of countries to lay the proposal to rest.

In summary, the unanimous agreement approach to amending the annexes to the Ocean Dumping Convention would not serve our interests and might well prove impossible to negotiate -- an outcome which could prevent agreement on the entire convention. The two-thirds approach or the variation permitting states to opt out of particular amendments would, therefore, be preferable. Neither of these approaches would adversely affect our security interests since, under the two-thirds approach, a specific amendment would not be applicable if we chose not to ratify it. Under the variation of this approach, we could, if necessary, opt out of objectionable amendments.

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Recommendation on Amendment Procedures

The Department of State, the Council on Environmental Quality and the Environmental Protection Agency recommend that the United States position on amendment procedures for the annexes be to support either two-thirds ratification for amendments to come into effect for those states ratifying such amendments, or the variation allowing individual states to opt out of amendments.

Approve _____

Disapprove _____

John N. Irwin II

John N. Irwin II
Chairman

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